Supreme Court, U.S.
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No. 00-1842

In The

Supreme Court of the United States

STATOIL ASA,

Petitioner,

v.

HEEREMAC V.O.F., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

THE SAIPEM RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Sherman Act, which governs U.S. "commerce . . . with foreign nations," apply to a Norwegian company's claim that its Norwegian operations were damaged by alleged overcharges by English and Dutch defendants on projects that occurred exclusively in the North Sea?

2. Can a foreign plaintiff whose only alleged injuries were incurred in a foreign country from the foreign effects of an alleged agreement among foreign defendants in connection with foreign transactions establish U.S. antitrust jurisdiction, and avoid the operation of the Foreign Trade Antitrust Improvements Act, merely by alleging that the foreign defendants' conduct also had an effect on some other person in U.S. domestic commerce?

3. When a foreign plaintiff's alleged injury arises out of the effect that foreign defendants' conduct has on foreign, rather than U.S. domestic commerce, does the foreign plaintiff have standing to assert claims under the U.S. antitrust laws?

PARTIES TO THE PROCEEDING

Petitioner Statoil ASA was previously known as Den norske stats oljeselskap a.s.

Respondents are HeereMac v.o.f.; Heerema Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek, Pieter Heerema; McDermott International, Inc.; McDermott Incorporated; J. Ray McDermott, Inc.; J. Ray McDermott, S.A.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston, L.L.C.; McDermott-ETPM, Inc.; Saipem S.p.A.; Saipem International B.V.; Saipem UK Limited; Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, S.A.

CORPORATE DISCLOSURE STATEMENT

Respondent Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, S.A. is wholly owned by Saipem (Portugal) Gestão e Participiçoes SGPS S.A., which is wholly owned, along with Respondent Saipem UK Limited, by Respondent Saipem International B.V. Respondent Saipem International B.V. is wholly owned by Respondent Saipem S.p.A. Respondent Saipem S.p.A. is partially owned (approximately 40 percent) by Eni, S.p.A.

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RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are the Sherman Act, 15 U.S.C. §§ 1, 2, and the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a. These statutes are set forth in full in the Appendix to this brief. *See* App. 39a.

STATEMENT OF THE CASE

I. Factual Background and Allegations

A foreign plaintiff alleges that its foreign operations have been damaged by the foreign effects of an alleged agreement among foreign defendants. Statoil is a Norwegian corporation with its principal place of business in Norway. 16 R. 417. The Saipem Defendants are also foreign citizens. 16 R. 411-08. Statoil's claims concern alleged damages that were "incurred in the Norwegian sector of the North Sea." *Id.* Specifically, Statoil contends that Saipem[1] or another foreign firm overcharged Statoil for the provision of heavy-lift services in connection with the construction of oil and gas platforms in the North Sea. Although Statoil makes conclusory allegations that Saipem participated in a worldwide conspiracy that had an effect on U.S. commerce, Statoil does not allege that its injury arose from these effects on U.S. commerce. Pet. 5. Nor could it: Statoil does not allege that it owns any platforms in U.S. waters, and it does not allege that it purchased any of the relevant goods or services in U.S. commerce.

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[1] "Saipem" refers to all Saipem entities named as defendants in this action.

Statoil incorrectly suggests that HeereMac's agreement to plead guilty to violating the Sherman Act in 1999 is somehow relevant to its claim of U.S. antitrust jurisdiction over Saipem in this case. Saipem is not named in the HeereMac information or the plea. Furthermore, HeereMac's plea relates only to the effects of ***its*** conduct on U.S. commerce, and HeereMac disputes in the plea that its conduct affecting foreign commerce is subject to U.S. law. Pet. App. at 61a-62a. In any event, Statoil has not alleged, and cannot allege, that it has been harmed in the U.S. domestic market place.

II. Proceedings in the Lower Courts

A. The District Court Dismissed Statoil's Claims, But Retained Jurisdiction Over Claims Based on Injuries that Arose from Anticompetitive Effects on U.S. Commerce

After HeereMac pleaded guilty, companies from around the world converged on the federal courts in Houston to seek redress under the U.S. antitrust laws. They named as defendants the world's providers of heavy-lift services, including Saipem.

The first cases were filed by Phillips Petroleum Company and three of its foreign-based subsidiaries. 1 R. 2096. The *Phillips* plaintiffs alleged injury to several projects, only one of which was in U.S. waters in the Gulf of Mexico. 1 R. 2075-2073. The other projects were located in the North Sea and the Far East, and the purchasers of heavy-lift services on those projects were Phillips' foreign-based subsidiaries. 1 R. 2073-2070. The district court dismissed the claims of the foreign subsidiaries regarding projects in foreign waters, because those injuries did not

arise from an effect on U.S. commerce. 7 R. 4143 *et seq.* The district court did not dismiss the claims related to the Phillips platform in U.S. waters. 7 R. 3966. Pet. App. 49a-50a. The district court also concluded (contrary to Statoil's suggestion, Pet. 6) that Saipem's actions did not have a direct, substantial, and reasonably foreseeable effect on U.S. commerce. Pet. App. 51a.

Statoil filed its action in Houston shortly before the foreign claims were dismissed in the *Phillips* case. Based on its reasoning in the *Phillips* case, the district court dismissed Statoil's claims because of a lack of subject matter jurisdiction and because Statoil lacked standing under U.S. antitrust laws. Pet. App. 50a-52a.

B. The Fifth Circuit Affirmed the Dismissal of Statoil's Claims

The Fifth Circuit affirmed on three grounds. First, the court held that Statoil's claims are not cognizable under the Sherman Act itself, as they do not involve " 'trade or commerce . . . ***with*** foreign nations.' " App. 12a (quoting 15 U.S.C. §§ 1, 2).[2] "The commerce that gives rise to the action here – the contracting for heavy lift barge services in the North Sea – was not United States commerce ***with*** foreign nations, but commerce ***between*** or ***among*** foreign nations – that is, between or among Statoil (a Norwegian corporation), Saipem (England), and Heer-eMac (The Netherlands)." *Id.* (emphasis in original). The

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[2] The Fifth Circuit's opinion is included in the Appendix to this Opposition, using the same page numbers as those in Statoil's Appendix.

Sherman Act, by its terms, simply does not apply to this wholly foreign commerce.

Second, the Fifth Circuit held that the plain language of § 6a(2) of the FTAIA requires Statoil to allege that its claim arose from the effect of the alleged conduct on U.S. commerce. App. 14a, 16a. Because Statoil's alleged injury does not "stem from the effect of higher prices for heavy-lift services in the Gulf [of Mexico]," the court held that Statoil cannot meet the FTAIA's requirements for anti-trust jurisdiction. App. 14a.

Third, the Fifth Circuit held that Statoil lacks standing. App. 22a n.32.

Judge Higginbotham dissented, arguing that § 6a(2) "removes jurisdiction over conspiracies whose effects on United States commerce are beneficial or benign . . . . " App. 25a. The Fifth Circuit denied *en banc* review, with no judge requesting a poll.[3] Pet. App. 54a.

To bolster its claim that this case presents a conflict – in "rationale" – among the circuits, Statoil suggests that the Fifth Circuit believed that federal courts disagree as to the appropriate test for the extraterritorial reach of the Sherman Act. Pet. 6. But the Fifth Circuit made clear that the issue was one of first impression in the courts of

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[3] Judge Higginbotham's suggestion that rehearing *en banc* would have been granted but for the recusal of three judges rings hollow because (1) there were still a sufficient number of judges eligible to vote to grant *en banc* review, and (2) not a single judge called for a poll, though all active judges plainly had the right to do so. 5th Cir. R. 35 (I.O.P.). *See* Pet. App. 55a.

appeals, and that the district courts addressing it had all reached the same conclusion as the Fifth Circuit: namely, that the FTAIA bars jurisdiction over a foreign party's claims that arise out of foreign effects of a defendant's alleged conduct. *See* App. 9a n.13, 18a.

REASONS FOR DENYING THE WRIT

This case presents the question whether U.S. antitrust jurisdiction reaches the claims of a foreign plaintiff whose injuries arise from the effects on foreign commerce of the defendants' alleged conduct. The Fifth Circuit answered this question in the negative on three separate and independent grounds: (1) Statoil's claims are not cognizable under the Sherman Act, (2) Statoil's claims are barred under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), and (3) Statoil cannot establish antitrust standing. Statoil focuses almost exclusively on the second issue, but to no avail: nothing in the Fifth Circuit's interpretation of the FTAIA warrants the grant of the Petition.

The Fifth Circuit is the only court of appeals to interpret the relevant provision of the FTAIA, 15 U.S.C. § 6a(2). It concluded that the FTAIA, its legislative history, and policy considerations compel the conclusion that plaintiffs may not recover under the U.S. antitrust laws for injuries arising in foreign commerce. The growing number of district courts that have addressed the issue have reached the same conclusion.

Unable to prevail on the question actually presented by this case, Statoil simply changes the question. Rather than arguing, as the FTAIA requires, that its injury arises

from the anticompetitive *effect* on U.S. commerce of the defendants' conduct, Statoil argues that its claim "arises directly out of the anticompetitive *conduct*." Pet. i (emphasis added). Statoil also focuses its argument on authorities that stand for the unremarkable proposition that antitrust plaintiffs must allege that the defendants' conduct has an anticompetitive effect on U.S. commerce. Statoil, however, cites no authority for the proposition that a plaintiff's own injury need not arise from those anticompetitive effects on U.S. commerce.

Statoil's inability to find supporting authority stems from the fact that the courts understand what Statoil does not: Congress intended the FTAIA to limit the application of the antitrust laws to injuries arising from anticompetitive effects *on U.S. commerce*. In doing so, Congress expressly desired to respect the sovereignty of other nations to govern their own markets and to encourage those nations to adopt their own competition laws. Statoil's alarmist suggestion that, absent the benign hegemony of the U.S. antitrust laws, international cartels will rule the world ignores the widespread adoption of competition laws around the globe, as well as the substantial deterrent effects that remain under the Fifth Circuit's decision. Nothing in the FTAIA, its legislative history, or relevant policy considerations requires the United States to be the world's forum for the resolution of all competition-related grievances.

For these and other reasons, the petition for writ of certiorari should be denied. First, the Fifth Circuit's decision presents no conflict among circuits. Second, it does not present a question of national importance to the U.S. economy that the Court should address at this time.

Finally, and most importantly, the decision below is correct.

I. The Fifth Circuit's Decision Presents No Conflict

Statoil attempts to manufacture a conflict in this case by arguing that the Fifth Circuit's "***rationale*** is inconsistent with that of relevant Supreme Court and appellate court precedents." Pet. 10 (emphasis added). Statoil must resort to arguments about "rationales" because every case that has considered the statutory provision at issue has agreed with the Fifth Circuit. In any event, the decisions of other courts are entirely consistent with the Fifth Circuit's decision.

A. Every Court that Has Considered the Meaning of § 6a(2) Has Agreed with the Fifth Circuit's Analysis

As the Fifth Circuit recognized, this case presented an issue of first impression in the courts of appeals with respect to the interpretation of § 6a(2)'s requirement that the forbidden effects on U.S. commerce must "give rise to a claim." *See* Pet. App. 9a n.13, 18-19a. But the district courts that have considered the issue have agreed, in a "unanimous line of authority," with the Fifth Circuit's interpretation of the FTAIA. *In re Auction Houses Antitrust Litig.*, 138 F. Supp. 2d 548, 551 (S.D.N.Y. 2001). *See Kruman v. Christie's Int'l plc*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001); *In re Microsoft Corp.*, 127 F. Supp. 2d 702 (D. Md. 2001); *Metallgesellschaft AG v. Sumitomo Corp. (In re Copper Antitrust Litig.)*, 117 F. Supp. 2d 875 (W.D. Wis. 2000); *Empagran, S.A. v. F. Hoffman-La Roche, Ltd.*, No. 00-1686

(TFH), 2001 WL 761360 (D.D.C. June 7, 2001); *Ferromin Int'l Trade Corp. v. UCAR Int'l*, No. 99-693 (E.D. Pa. June 13, 2001). Neither the Dissent nor Statoil attempts to distinguish these cases.

For example, in *Christie's*, the plaintiffs alleged a conspiracy to fix prices for auction services in the United States and abroad. 129 F. Supp. 2d at 622. *Christie's* raised the same question as does this case:

> The fundamental question here is whether a transnational price fixing conspiracy that affects commerce both in the United States and in other countries inevitably gives persons injured abroad in transactions otherwise unconnected with the United States a remedy under our antitrust laws. Unless the Court is to impute to Congress an intention to establish an antitrust regime to cover the world, the answer must be "no."

Id. at 623-24. The court therefore dismissed the claims of the plaintiffs who purchased the defendants' auction services abroad. *Id.* at 626.

Likewise, *In re Microsoft* rejected claims made by purchasers in foreign commerce, even though Microsoft's alleged conduct had substantial effects on U.S. commerce. Like Statoil, the foreign *Microsoft* plaintiffs alleged that they were injured by the same conduct that affected U.S. commerce, and that their injuries were necessary to achieve the anticompetitive effects felt in the United States. *See* 127 F. Supp. 2d at 716. The court, however, held "that a plaintiff who has not participated in the U.S. domestic market may not bring a Sherman Act claim under the FTAIA." *Id.*

The court in *Sumitomo* reached a similar conclusion. The *Sumitomo* plaintiffs alleged that the defendants conspired to restrain trade on the London Metals Exchange, where 95% of the world's copper futures are traded, and which serves as the primary exchange for merchants and traders in the United States. *See* 117 F. Supp. 2d at 878. The plaintiffs contended that by artificially driving up the price of copper futures on the LME, the defendants caused copper prices in the United States to be artificially inflated. *Id.* at 879-80. The plaintiffs, however, were foreign entities that were injured by adverse effects on the LME. *Id.* at 877, 880, 887. The *Sumitomo* court dismissed the plaintiffs' claims, holding that "[t]he logical interpretation of the language of § 6a is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market." *Id.* at 887.

The court in *Empagran* granted defendants' motion to dismiss antitrust claims brought by purchasers of vitamins in foreign commerce. *See* 2001 WL 761360, at *1. Like Statoil, the *Empagran* plaintiffs alleged a global conspiracy to fix the price of their product in the United States and abroad. *See id.* at *1, 2. The court held that the plaintiffs were required, but failed, to allege that "the injuries they seek to remedy 'arise' from an anticompetitive effect of defendants' conduct on U.S. commerce." *Id.* at *2.

Most recently, *Ferromin* dismissed claims brought by purchasers in foreign commerce who alleged price fixing and market allocation in the "worldwide market for graphite electrodes." Slip op. at 2-3. The court reviewed the applicable caselaw and concluded that "[t]he one

federal appeals court and many district courts" addressing § 6a(2) all concluded that plaintiffs asserting a claim under U.S. antitrust laws must "show ***both*** that the complained-of conduct had a direct, substantial and reasonably foreseeable effect on the United States domestic marketplace, ***and that an anticompetitive effect on the United States marketplace*** must give rise to plaintiff's claimed injuries." *Id.* at 6 (emphasis in original). Neither Statoil nor the Dissent address this "unanimous line of authority" supporting the Fifth Circuit's decision.

B. The Cases on Which Statoil Relies Are Entirely Consistent with the Fifth Circuit's Decision

In an effort to buoy its novel interpretation of the FTAIA, Statoil points to several cases that it contends conflict with the Fifth Circuit's "rationale" or "approach" in this case. Most of those cases involve plaintiffs who sustained their injury in U.S. commerce, and thus are entirely consistent with the Fifth Circuit's decision.

For example, as the Dissent in this case conceded, the plaintiff in *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), made its purchases in the United States. Pet. App. 29a. *See Pfizer*, 434 U.S. at 318 ("When a foreign nation enters ***our commercial markets*** as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or domestic state.") (emphasis added). In any event, antitrust jurisdiction was not raised in *Pfizer*, which considered only whether foreign nations are "persons" under the Clayton Act: "We hold today ***only*** that a foreign nation ***otherwise entitled to sue in our courts*** is entitled to sue for treble damages

under the antitrust laws ***to the same extent as any other plaintiff.***" *Id.* at 320 (emphasis added).

Likewise, the plaintiffs in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), were nineteen U.S. states and certain private plaintiffs who asserted injury arising from the ***domestic*** effects of a conspiracy directed at the ***domestic marketplace***: they alleged that the defendants "conspired in violation of § 1 of the Sherman Act to restrict the terms of commercial general liability (CGL) insurance ***available in the United States.***" *Id.* at 770 (emphasis added).

The plaintiffs in *Caribbean Broadcast System v. Cable & Wireless*, 148 F.3d 1080 (D.C. Cir. 1998), also alleged an injury arising out of harm to domestic commerce. In *Caribbean*, the plaintiff was a radio broadcaster that was physically located in the British Virgin Islands, but which broadcast to the Eastern Caribbean, including the U.S. Virgin Islands and Puerto Rico. *Id.* at 1082. Although the plaintiff was foreign, it nevertheless alleged an injury arising from domestic effects – namely, that defendants, which operated a competing radio station, had monopolized and therefore prevented the plaintiff from participating in the U.S. market for radio advertising. *See* 148 F.3d at 1087 (stating that plaintiff "alleges that [plaintiff] was and remains foreclosed from selling advertising to many of those U.S. companies that had purchased advertising time from [defendant]" at supracompetitive prices); *id.* at 1086 (observing jurisdiction proper because "the alleged injury is to advertisers ***in the United States***"). Nothing in the opinion supports Statoil's assertion that *Caribbean* permitted the plaintiff to pursue ***all*** of its

claims for damages, whether based on foreign or domestic effects. *See* Pet. 25. In any event, the parties in *Caribbean* did not raise, and the court did not consider, whether the FTAIA requires proof that the plaintiff's injury arose from the anticompetitive effect on U.S. commerce.[4]

Statoil's reliance on *U.S. v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997), is similarly misplaced. The indictment in *Nippon* alleged that the defendant and others agreed "to fix the price of thermal fax paper ***throughout North America***" and that the defendant "sold thermal fax paper worth approximately $6,100,000 for ***import into the United States.***" *Id.* at 2 (emphasis added). *Nippon* thus involved targeted sales by the conspirators into the United States with injuries flowing from the effects of that conspiracy within the United States. In any event, *Nippon* expressly disclaimed reliance on the FTAIA and made no pretense of interpreting it. *See id.* at 4.

Statoil also cites dicta from numerous cases to support the argument that those cases "point in a direction

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[4] The *Caribbean* court observed that the plaintiff raised only two issues: (1) whether the case was an export case governed by § 6a(1)(B), *see id.* at 1086, or (2) whether "the complaint failed to allege either harm to U.S. commerce or a relevant market," *id.* at 1085, 1086-87. With respect to the latter, the defendants were making the argument – common to antitrust suits brought by competitors – that harm to a competitor is not necessarily harm to competition. The court rejected the defendants' argument, holding that "injury to [the plaintiff] is ultimately a harm to U.S. purchasers of radio advertising," because "[b]y keeping [the plaintiff] out of the market, [the defendants] denied such purchasers the benefit of competition." 148 F.3d at 1087.

quite different" from the Fifth Circuit's decision merely because they state that a plaintiff must allege that the U.S. market has suffered an anticompetitive effect. Pet. 27-28. However, in each of those cases, the court's refusal to assert jurisdiction was proper because the plaintiffs' claims did not arise from any forbidden effects on U.S. commerce.[5] Statoil's reliance on those cases is therefore puzzling,[6] and they further demonstrate the unanimity

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[5] *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 815 (9th Cir. 1988) (holding no jurisdiction where plaintiffs alleged they sold pipe in the U.S. and overseas, but their alleged injury arose from termination of an agreement to be defendant's "exclusive representative in the sale, promotion and distribution of PB resin and products ***in South East Asia and other areas***" and where plaintiffs alleged only injury to themselves, rather to competition in the relevant market); *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F. Supp. 1102, 1103-04, 1106 (S.D.N.Y. 1984) (dismissing claims of German wholesaler, distributer, importer and exporter of pharmaceuticals that alleged price fixing in world market for Vibramycin artificially inflated the price in the United States); *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985) ("The consequences suffered ***by plaintiff*** are limited to St. Kitts. Accordingly, these effects do not establish a jurisdictional nexus.") (emphasis added); *McElderry v. Cathay Pacific Airways*, 678 F. Supp. 1071 (S.D.N.Y. 1988) (finding lack of subject matter jurisdiction where American citizen alleged illegal overcharges in foreign commerce).

[6] Even if Statoil could prove an anticompetitive effect on a U.S. market, that would not be sufficient to show that U.S. antitrust jurisdiction exists. Statoil incorrectly assumes that because proof of an anticompetitive effect on the U.S. is a ***necessary*** element, it must also be ***sufficient***, standing alone, to establish jurisdiction. As every court that has decided this issue has held, the FTAIA requires proof not only of a domestic anticompetitive effect, but also that the plaintiff's injury arose

with which courts have concluded that the FTAIA does not permit jurisdiction over claims arising out of foreign effects.

II. The Fifth Circuit Correctly Held that There Is No Jurisdiction in this Case

There is a reason no plaintiff has persuaded any court to assert antitrust jurisdiction over the claims of a plaintiff in a foreign market with no injuries arising from an effect on U.S. commerce: both the Sherman Act and the FTAIA preclude jurisdiction in such cases.

A. The Sherman Act Does Not Apply to Commerce Within or Between Foreign Nations

First, Statoil does not even attempt to challenge the Fifth Circuit's holding that Statoil's claims are outside the scope of the Sherman Act itself. App. 12a. The Act applies only to actions affecting "trade or commerce among the several states or ***with*** foreign nations." 15 U.S.C. §§ 1, 2 (emphasis added). Statoil, a Norwegian company, purchased heavy-lift services in the Norwegian sector of the North Sea from foreign entities like Saipem. Thus, it improperly seeks to apply the Act to commerce ***between*** foreign nations. *See* IA Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 273, at 383 (1997) (term "commerce . . . with foreign nations" "generally refers to

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from that effect. Courts that find no U.S. effect obviously have no need to address whether the plaintiff's injury arose from that nonexistent effect.

transactions in which a foreign seller deals with an American purchaser, or vice-versa. . . . ") ("AREEDA"). This conclusion is further supported by the presumption that, absent an "affirmative intention of the Congress, clearly expressed," a statute is "primarily concerned with domestic conditions." *See EEOC v. Aramco*, 499 U.S. 244, 248 (1991). Because Statoil has waived this independent ground supporting the Fifth Circuit's judgment, *see Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992), granting the writ would be futile, as Statoil would not be entitled to reversal even if the Court agreed with its challenges to the Fifth Circuit's holdings on the FTAIA and standing. The Petition should be denied on this ground alone.

B. The FTAIA Precludes Jurisdiction Over Statoil's Claims

Statoil argues that § 6a(2)'s requirement that the effect on U.S. commerce must "give[ ] rise to a claim" under the Sherman Act means that as long as someone sustained an antitrust injury in the U.S. market as a result of the defendants' conduct, then anyone, anywhere in the world who sustained an injury in a foreign market as a result of the same "conduct" likewise may invoke the jurisdiction of U.S. courts. Statoil's argument is contrary to the text of the statute, its legislative history, and fundamental policy concerns underlying the statute's passage.

1. The Plain Language of the FTAIA Precludes Jurisdiction

The FTAIA removes Sherman Act jurisdiction over certain transactions in commerce with foreign nations, making it inapplicable to "conduct involving trade or commerce . . . with foreign nations" unless "(1) such conduct has a direct, substantial and reasonably foreseeable effect" on U.S. domestic or import commerce, and "(2) such effect gives rise to a claim" under the Sherman Act. *See* 15 U.S.C. § 6a. Statoil's claims are not cognizable under the plain text of the statute, because Statoil does not allege that its claims arise out of any effect on U.S. commerce. Rather, its claims arise out of an effect, if any, on foreign commerce. App. 14a-16a. *See Sumitomo*, 117 F. Supp. 2d at 883 ("The most natural way of reading this language is that antitrust laws do not apply unless the ***effects*** are the same. In other words, the Sherman Act claim that a plaintiff alleges and the Sherman Act claim that arises out of the effect on an American market must be the same.") (emphasis in original).

The Fifth Circuit applied the FTAIA in this straightforward manner. Under the FTAIA, the ***conduct*** must have a direct, substantial, and reasonably foreseeable effect on U.S. commerce, and ***"such effect"*** on U.S. commerce must give rise to the claim. Statoil's claims arise out of alleged effects in the Norwegian sector of the North Sea, in its transactions with British or Dutch entities, not from inflated prices it alleges were felt by other purchasers participating in the U.S. marketplace in the Gulf of Mexico. Statoil's proffered interpretation seeks to

avoid the FTAIA's requirement that the *effect* on domestic commerce must give rise to its claim, by suggesting – contrary to the statute – that it need plead only that the *"conduct"* give rise to a claim by someone else in the U.S. marketplace. *See* App. 15a; Pet. at i.

Statoil's textual challenge to the Fifth Circuit's decision is based entirely on the FTAIA's use of a single word in § 6a(2): "a." Quoting the Dissent, Statoil argues that " '[t]he word "a" has a simple and universally understood meaning. It is the indefinite article.' " Pet. 11 (quoting App. 24a-25a). From this purportedly universal truth, Statoil concludes that "gives rise to a claim" must mean "gives rise to *any* claim." *Id.*

But "a" may and often does have a specific reference. As explained by the very treatise on which Statoil relies,[7] the meaning of "a" must be determined from its context:

> The word "a" has varying meanings and uses. . . . ***[T]he meaning depends on context. For example, in Workers' Compensation Act, on, or in or about "a" railway, factory, etc., was held not to mean any railway, factory, etc., but the railway, factory, etc. of the employer.***

DELUXE BLACK'S LAW DICTIONARY 1 (6th ed. 1990) (emphasis added).[8] The fact that "a" is frequently specific is well

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[7] Statoil relies on Black's Law Dictionary, but quotes only the definition of "the." *See* Pet. 11 n.9.

[8] As another treatise explains, "[a]lthough *a* and *an* are indefinite in meaning, reference may be general (any person or thing of that class or kind) or more particular (an actual example of the class or kind)." THE OXFORD ENGLISH DICTIONARY OF ENGLISH GRAMMAR 200 (1994) (providing as an example the sentence,

recognized elsewhere in the law. *See U.S. v. Maldonado-Rivera*, 922 F.2d 934, 960 (2d Cir. 1990) (holding references to "a conspiracy" meant "the conspiracy" with which defendant was charged). Rule 12(b)(6) of the Federal Rules of Civil Procedure likewise permits dismissal for failure to state "a" claim, but is applied when the plaintiff has failed to make allegations supporting the plaintiff's ***own*** claim. *See, e.g., Schlesinger v. Herzog*, 2 F.3d 135, 138 (5th Cir. 1993) (affirming dismissal of claims under Rule 12(b)(6) when ***plaintiffs*** failed to allege that ***they*** were purchasers with standing to bring claim).

In this case, the context of the FTAIA establishes that "a" should be interpreted as referring to the injury sought to be redressed in the case. The statute on its face is designed to ***restrict*** the scope of jurisdiction in Sherman Act cases. *See* 15 U.S.C. § 6a ("Sections 1 to 7 of this title ***shall not apply*** . . . ***unless*** . . . . "). Statoil's interpretation turns the FTAIA on its head, expanding the reach of U.S. antitrust laws to authorize jurisdiction over the claims of every participant in a foreign marketplace who alleges that someone else, who participated in U.S. commerce, also sustained an injury. Nothing in the FTAIA indicates an intent by Congress to turn the U.S. district courts into the world's forum for settling competition-related grievances. *See* App. 15a-16a.[9]

"I've still got a card my grandfather sent from Kabul (*specific*: a particular card and no other)").

[9] The presumption against extraterritoriality further supports this interpretation. *See* page 15, *supra*. Statoil's contention that this presumption does not apply because the FTAIA addresses extraterritoriality assumes the answer to the question in this case: How far do the U.S. antitrust laws reach

Statoil further contends that the Fifth Circuit, by reading § 6a(2) to require that the U.S. effects give rise to the plaintiff's claims, renders superfluous the following proviso:

> "If [the Sherman Act] appl[ies] to such conduct only because of operation of paragraph (1)(B) [*i.e.*, based solely on effects on export commerce], then [the Sherman Act] shall apply to such conduct ***only for injury to export business in the United States.***"

Pet. 14 (quoting 15 U.S.C. § 6a) (emphasis added). But the proviso on its face is not designed to limit claims to those that stem from the forbidden effect on U.S. export commerce. Rather, the proviso's plain language imposes an ***additional*** restriction: in export cases, it limits the type of business that may sustain a compensable loss to "export business in the United States." Simply put, § 6a(2) limits the requisite ***source*** of an actionable injury – effects on U.S. commerce – while the proviso addresses the ***identity*** and ***location*** of businesses that may sustain compensable injuries in export cases – export business in the United States. *See Sumitomo*, 117 F. Supp. 2d at 884. In the absence of the proviso, foreign purchasers of a U.S. exporter's products could sue under the U.S. antitrust laws after showing that their injury arose from the forbidden "effect" on U.S. export commerce. *Id.*

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under the FTAIA? Because Congress has not clearly expressed an intent to reach injuries arising in wholly foreign commerce (indeed, it has clearly expressed the opposite intent), the presumption applies.

2. The Legislative History of the FTAIA Confirms that There Is No Jurisdiction

Unable to find support in the FTAIA's language, Statoil spends the bulk of its petition arguing about legislative history. But where, as here, there is a "straightforward statutory command, there is no reason to resort to legislative history." *U.S. v. Gonzales*, 520 U.S. 1, 6 (1997).

In any event, the legislative history squarely supports the Fifth Circuit's interpretation. The report of the Judiciary Committee makes clear that one of the "considerations providing the basis for this legislation" was the concern that "courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists." H.R. REP. No. 97-686, at 2. Thus, as Statoil recognizes, one of the main purposes of the FTAIA is "to more clearly establish when antitrust liability attaches to international business activities." *Id.* at 7. *See* Pet. 2. Consistent with the plain text of the FTAIA, the legislative history confirms Congress' intent to reach international activities only when the plaintiff has participated in the U.S. market, such that its claims arise from the forbidden effect of the defendant's activities on U.S. commerce:

> . . . H.R. 5235 preserves antitrust protections ***in the domestic marketplace*** for all purchasers, regardless of nationality or the situs of the business . . . .

H.R. REP. 97-686, at 10.

The committee also expressed the hope that "the clarified reach of our own laws could encourage our trading partners to take more effective steps to protect

competition in their markets." *Id.* at 14. Under Statoil's reading of the statute, this purpose would be superfluous: only by clarifying that the U.S. antitrust laws ***do not*** protect competition in foreign markets would the FTAIA encourage our trading partners to enact their own competition laws. As explained in more detail below, Congress' goal has largely been realized, as the vast majority of nations involved in world trade have adopted competition laws of their own. *See* pages 26-27, *infra*.

Furthermore, the Committee made clear that the "claim" to which the legislation referred was the injury for which the plaintiff or the government seeks redress, not the injury of someone else:

> The Committee did not believe that the bill reported by the Subcommittee was intended to confer jurisdiction ***on injured foreign persons*** when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full Committee added language to the Sherman and FTC Act amendments to require that ***the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged*** under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States, or, in the case of conduct lacking such an

> impact, on an export opportunity of a person doing business in the United States.

Id. at 11-12, 13 (emphasis added).[10]

Statoil points to nothing in the committee report that states that Congress intended the FTAIA to allow anyone, anywhere in the world to sue under the U.S. antitrust laws upon a showing that some ***other*** person has a claim arising out of the U.S. effects of the alleged conduct. Rather, when read in context, the majority of the quotations that Statoil plucks from the legislative history merely stand for the unremarkable proposition that foreign parties who are ***injured in the U.S. market*** may sue under the U.S. antitrust laws for that injury so long as they can show that the conduct had a direct, substantial, and reasonably foreseeable effect on the U.S. domestic market. *See, e.g.*, Pet. 8, 15, 18. Statoil, however, does not allege that its injury arose from such U.S. market effects.

In its most selective use of legislative history, Statoil omits key sentences (emphasized below) that confirm

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[10] Statoil contends that this section of the committee report shows that Congress intended to require only that the conduct have an anticompetitive effect on U.S. commerce. Pet. 13 n.11. While the first sentence certainly refers to an anticompetitive effect, the second sentence plainly requires that the injury for which redress is sought must arise out of that effect. *See* H.R. REP. 97-686, at 12 ("[T]he 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws."). The last two sentences merely provide that the party need not be physically in the U.S. when it sustains the injury. For example, while the government of India may have suffered its injury abroad in *Pfizer*, it suffered injury as a result of pharmaceuticals purchases in the U.S. market. *See* pages 10-11, *supra*.

that foreign purchasers may recover under the FTAIA only for injuries sustained in domestic commerce:

> A course of conduct in the United States – *e.g.*, price fixing not limited to the export market – would affect all purchasers of the target products or services, whether the purchaser is foreign or domestic. The conduct has the requisite effects within the United States, even if some purchasers take title abroad or suffer economic injury abroad. *Cf., e.g., Pfizer Inc., et al. v. Government of India, et al*, 434 U.S. 308 (1978). ***Foreign purchasers should enjoy the protections of our antitrust laws in the domestic marketplace***, just as our citizens do. Indeed, to deny them this protection could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations.
>
> There are other reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer, supra*, 434 U.S. at 314-315, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.

H.R. REP. No. 97-686, at 10 (emphasis changed). *Compare* Pet. 18. Courts that have considered the portions of the committee report cited by Statoil conclude that they compel the conclusion that the FTAIA permits suit "only where the conduct complained of had 'direct, substantial and reasonably foreseeable effects' in the United States and the effects giving rise to jurisdiction are also the basis

of the alleged injury." *E.g.*, *Christie's*, 129 F. Supp. 2d at 624-25. Nothing in the committee report "say[s] that jurisdiction actually exists if the plaintiff actually makes the purchase abroad and does not otherwise participate in a U.S. market." *In re Microsoft Corp.*, 127 F. Supp. 2d at 715.

Most of the remaining passages from the legislative history cited by Statoil suggest that the requisite effect on domestic commerce must be anticompetitive. *See, e.g.*, Pet. 12-13. The committee report makes clear, however, that the FTAIA was not intended to change prior law as to when antitrust injury or an anticompetitive effect must be shown, or the nature of such a showing. *See* H.R. REP. 97-686, at 13 (stating the FTAIA "does not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim would remain unchanged"). Although Statoil quotes Rep. Rodino's "Additional Views" to support its argument that the "gives rise to a claim" language was added to require that the effect must be anticompetitive, Pet. 12, nothing in his statement addresses whether the injury for which redress is sought must also arise out of a domestic, rather than foreign, anticompetitive effect. Moreover, Rep. Rodino's "Additional Views" cannot override the report adopted by the full committee, which expressly states that the language was changed to ensure that the injury for which redress is sought arose from the prohibited domestic effect:

> [T]he full Committee added language to the Sherman and FTC Act amendment to require that the "effect" providing the jurisdictional

> nexus must also be the basis for the injury alleged under the antitrust laws.

H.R. REP. 97-686, at 12.

3. Policy Considerations Support the Fifth Circuit's Decision

Statoil ultimately retreats to the argument that the Fifth Circuit's construction of the statute "undermines the deterrent effect of the federal antitrust laws." Pet. 16. But "policy considerations cannot override [the] interpretation of the text and structure" of a statute. *Central Bank v. First Interstate Bank*, 511 U.S. 164, 188 (1994). As previously established, Congress has determined that U.S. markets will be sufficiently protected if persons who sustain injuries in U.S. domestic markets can bring claims. Statoil's dissatisfaction with this judgment in no way justifies rewriting the statute.

Notably, Statoil focuses almost exclusively on whether the Fifth Circuit's decision "undermines the deterrent effect of the federal antitrust laws." Pet. 16. It offers no serious argument – much less empirical evidence – that the Fifth Circuit's decision will result in insufficient deterrence of international cartels generally. This omission is no oversight. The penalties available under U.S. law as well as the law of other nations provide ample deterrence, both before and after the Fifth Circuit's decision.

For example, violators of the U.S. antitrust laws remain subject to treble damages in private actions for all

effects on U.S. commerce.[11] They may also be subject, in government actions, to prison sentences, restitution, and substantial fines. Statoil does not explain why any rational corporation and its officers would subject themselves to this array of penalties – including felony conviction and the loss of personal liberty – by participating in any part of an international conspiracy affecting U.S. commerce. It certainly cannot be assumed that rational businesses and corporate officers would consider these penalties to be a reasonable cost of doing business.

Furthermore, Statoil itself has made clear that foreign competition laws provide ample deterrence. Statoil's submissions to the district court show that Norway's antitrust regime would apply to the conduct alleged by Statoil, and that, upon proof of a violation, the Defendants would have to disgorge and pay Statoil its full damages. 16 R. 675-74. Indeed, Statoil has commenced proceedings in Norway. Pet. 10 n.8.

Moreover, as of 1998, 70 countries, comprising 86% of world trade, had enacted their own competition laws. *See* Mark R.A. Palim, *The Worldwide Growth of Competition Law: An Empirical Analysis*, ANTITRUST BULLETIN 105, 109 (March 22, 1998). Just two years later, the number had increased to nearly 90, and roughly 20 more were in the

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[11] Neither Saipem nor the other defendants argue that foreign parties should be denied the right to sue under the antitrust laws, ***provided that the other requirements of the FTAIA are met*** (*i.e.*, their injury arises from a direct, substantial and reasonably foreseeable effect on domestic commerce). The Fifth Circuit's ruling does nothing to limit the rights of consumers, domestic or foreign, injured in U.S. commerce. *See* pages 2-4, *supra*.

process of drafting such laws. *See* A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Address Before the Fordham Corporate Law Institute 27th Annual Conference on International Antitrust Law and Policy (October 19, 2000), *available at* <www.usdoj.gov/atr/public/speeches/6785.htm>. Thus, the congressional goal of encouraging the adoption of antitrust regimes abroad has been fulfilled. *See* pages 20-21, *supra* (discussing H.R. REP. 97-686, at 14).

This congressional goal also confirms that Congress did not intend the United States to be the world's forum for the resolution of all competition-related grievances. As the Fifth Circuit observed, Statoil's strained interpretation of the FTAIA would permit persons and entities all over the world who have no contact with U.S. markets to file suit in the United States claiming that they were injured by conduct that also had an effect on U.S. commerce. App. 22a.

The "authorities" that Statoil cites to support its "policy" argument share the same infirmity suffered by its citations to cases and legislative history: none states that the FTAIA permits suits by foreign purchasers of foreign goods or services who sustained their harm in foreign markets. Certainly, *Pfizer* makes no such statement. *See* pages 10-11, *supra*. Nor do the passages from the Department of Justice materials on which Statoil relies state that a foreigner's injuries in a foreign market support U.S. antitrust jurisdiction. *See* U.S. Dep't of Justice, Antitrust Div., International Competition Pol'y Advisory Comm., *Final Report to the Attorney General and Assistant Attorney General for Antitrust* 247 (Feb. 2000) ("DOJ Report"), *cited in* Pet. 17, 20 n.15, 21 n.16; U.S. Dep't of Justice & Federal

Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.12 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,107, *cited in* Pet. 19, 27.

Statoil has simply offered no support for the suggestion that, unless U.S. antitrust law is extended to circle the globe, international cartels will overrun the world.

III. The Fifth Circuit's Judgment Can Be Supported on the Independent Ground that Statoil Lacks Standing

Statoil's lack of standing presents an independent ground for affirming the judgments of the district court and the Fifth Circuit. Statoil contends that if the FTAIA permits antitrust jurisdiction, then Statoil necessarily has standing. *See* Pet. 7 n.5. But antitrust standing requires a more intensive inquiry. *See Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). A private plaintiff must prove "antitrust injury," which requires "injury of the type that antitrust laws were intended to prevent and that flows from that which makes the conduct illegal." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 333, 334 (1990). Statoil's claims meet neither requirement.

First, Statoil's alleged injury is not of the type the antitrust laws were intended to prevent: "[T]he concern of the [U.S.] antitrust laws is the protection of ***American*** consumers and ***American*** exporters, not foreign consumers or producers." AREEDA, ¶ 272h2, at 362-63 (emphasis in original). Statoil alleges that, although its injury arose in foreign commerce, the U.S. antitrust laws nevertheless apply because consumers in U.S. commerce

suffered injury. Statoil, however, may not recover based on harms to those consumers. *See de Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 518 (S.D.N.Y. 1985) (plaintiff injured in foreign commerce cannot claim standing based on injury to consumers in domestic commerce); *In re Microsoft*, 127 F. Supp. 2d at 716 (holding that, even if jurisdiction were proper under the FTAIA, foreign plaintiffs who suffered effects in foreign commerce had no standing).

Second, Statoil's injury does not "flow[ ] from that which makes defendants' acts unlawful." *Atlantic Richfield*, 495 U.S. at 334. Under the FTAIA, merely engaging in conduct that has anticompetitive effects in ***foreign commerce*** does not violate the U.S. antitrust laws. Conduct is rendered unlawful only when it causes anticompetitive effects in ***U.S. commerce***. But Statoil cannot argue that its injury "flows from that which makes defendants' acts unlawful" – the alleged effect on U.S. commerce. Accordingly, even if jurisdiction exists under the FTAIA, the Fifth Circuit's judgment should be affirmed based on Statoil's lack of standing.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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July 12, 2001

United States Court of Appeals,
Fifth Circuit

DEN NORSKE STATS OLJESELSKAP AS,
Plaintiff-Appellant,

v.

HEEREMAC VOF; Heerma Marine Contractors; Heerema Offshore Services U.S., Inc.; Heerema Offshore Construction Group, Inc.; Jan Meek; Pieter Heerema; McDermott International, Inc.; McDermott, Inc.; J. Ray McDermott, SA; J. Ray McDermott, Inc.; J. Ray McDermott Gulf Contractors, Inc.; McDermott Engineers & Constructors (USA), Inc.; McDermott Engineering Houston LLC; McDermott - ETPM, Inc.; Saipem SPA; Saipem International BV; Saipem UK Limited; Saipem (Portugal) -- Comercio Maritimo, Sociedade Unipessoal, SA,
Defendants-Appellees.

No. 99-20763

Feb. 5, 2001

Norwegian oil corporation brought antitrust conspiracy claim against providers of heavy-lift barge services. The United States District Court for the Southern District of Texas, Melinda Harmon, J., dismissed for lack of subject matter jurisdiction, and appeal was taken. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that antitrust laws did not apply to plaintiff's claims that anticompetitive conspiracy inflated its North Sea operating costs.

Affirmed.

Patrick E. Higginbotham, Circuit Judge, dissented and filed opinion.

Arthur R. Miller (argued), Cambridge, MA, Jacob Dweck, Rebecca L. Hirsch, Sutherland, Asbill & Brennan, Washington, DC, James R. McGibbon, Sutherland, Asbill & Brennan, Atlanta, GA, Craig Barkell Glidden, Patricia Hall Webb, Jeffrey Alan Kaplan, McFall, Glidden, Sherwood & Breitbeil, Houston, TX, for Plaintiff-Appellant.

Jonathan D. Schiller, William A. Isaacson, Boies, Schiller & Flexner, Washington, DC, for Heeremac Vof, Heerma Marine Contractors, Heerema Offshore Services U.S., Inc., Heerema Offshore Constr. Group, Inc., Meek and Heerema.

William J. Linklater, Michael A. Pollard, Baker & McKenzie, Chicago, IL, Jacks C. Nickens, Clements, O'Neill, Pierce, Nickens & Wilson, Houston, TX, for Heerma Marine Contractors, Heerema Offshore Services U.S. Inc., Heerema Offshore Construction Group Inc., Jan Meek and Pieter Heerema.

Charles Alan Gilman (argued), Patricia Farren, Cahill, Gordon & Reindel, New York City, Innes A. Mackillop, White, Mackillop & Boham, Houston, TX, for McDermott Intern., Inc., McDermott, Inc., J. Ray McDermott SA, J. Ray McDermott Inc., J. Ray McDermott Gulf Contractors Inc., McDermott Engineers & Constructors (USA) Inc., McDermott Engineering Houston LLC and McDermott-ETPM Inc.

Robin C. Gibbs, Kathy Dawn Patrick (argued), John Albert Basinger, Gibbs and Bruns, Houston, TX, for Saipem SPA, Saipem Intern. BV, Saipem UK Ltd. and Saipem (Portugal)-Comercio Maritimo, Sociedade Unipessoal, SA.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal requires us to interpret the scope of the United States antitrust laws and their application to foreign conduct. The plaintiff is a Norwegian oil corporation that conducts business solely in the North Sea. It seeks redress under the United States antitrust laws against the defendants for an alleged anticompetitive conspiracy that supposedly inflated the plaintiff's operating costs in the North Sea. Supreme Court precedent makes clear as a general proposition that United States antitrust laws "do not regulate the competitive conditions of other nations' economies," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). More specifically, today we are bound by the plain language of the Foreign Trade Antitrust Improvements Act (FTAIA). Thus, even though the plaintiff alleges that the antitrust conspiracy raised prices in the United States, it fails to assert jurisdiction under the antitrust laws because the plaintiff's injury did not arise from that domestic anticompetitive effect. Accordingly, we find that the district court properly dismissed the plaintiff's antitrust claims for lack of subject matter jurisdiction. It follows that we affirm the court's determination that the plaintiff lacked antitrust standing to bring these claims in United States federal court.

I

We begin with the basics. Sections 1 and 2 of the Sherman Act prohibit restraints of trade and monopolization. Section 1 reads:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C. § 1. Section 2 of the Sherman Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or

commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

15 U.S.C. § 2. The FTAIA, enacted by Congress in 1982 to clarify the application of United States antitrust laws to foreign conduct, limits the application of such laws when non-import foreign commerce is involved. The FTAIA states that the antitrust laws will not apply to non-import commerce with foreign nations unless the conduct at issue has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce *and* "such effect gives rise to a claim under" the antitrust laws. [1]

II

The plaintiff, Den Norske Stats Oljeselskap As ("Statoil"), is a Norwegian oil company that owns and operates oil and gas drilling platforms exclusively in the North Sea. The defendants are providers of heavy-lift barge services in the Gulf of Mexico, the North Sea, and the Far East. Only six or seven heavy-lift barges exist in the world. These immense

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[1] 15 U.S.C. § 6a. In full, the FTAIA reads:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section. [Proviso] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

vessels have cranes capable of hoisting and transporting offshore oil platforms and decks weighing in excess of 4,000 tons. During the 1993-1997 time frame, which is at issue in this suit, the three defendants controlled these barges.[2] Between 1993 and 1997, Statoil purchased heavy lift barge services from the HeereMac and Saipem defendants in the North Sea.

Statoil alleges that the defendants conspired to fix bids and allocate customers, territories, and projects between 1993 and 1997. Under the alleged arrangement, the defendants agreed that HeereMac and McDermott would have exclusive access to heavy-lift projects in the Gulf of Mexico, while Saipem would receive a higher allocation of North Sea projects in exchange for staying out of the Gulf. The defendants also allegedly agreed to submit embellished bids on heavy-lift projects. As a result of this conspiracy, Statoil contends that it paid inflated prices for heavy-lift barge services in the North Sea.[3] Statoil further argues that the conspiracy compelled it to charge higher prices for the crude oil it exported to the United States.[4] Finally, Statoil asserts that purchasers of heavy-lift services in the Gulf of Mexico were

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[2] The first group of defendants, HeereMac v.o.f. and its subsidiaries, a foreign corporation with its principal place of business in The Netherlands, controlled four or five of the barges. Saipem S.P.A., a British company, controlled one heavy-lift barge. McDermott, Inc., an American corporation, apparently controlled the last barge.

[3] Statoil does not allege that it purchased any heavy-lift services in the United States or that the contracts it entered into included agreements to apply United States law.

[4] Statoil asserts that it has exported an average of 400,000 barrels of oil a day into the United States over the past three years. Statoil does not, however, allege any injury to itself derived from its export of oil to the United States.

forced to pay inflated prices for those services because of the conspiracy.[5]

III

By way of background, it should be noted that in December 1997, the United States Department of Justice filed a criminal complaint against defendants HeereMac and Jan Meek, one of HeereMac's managing directors. The complaint alleged that the defendants conspired "to suppress and eliminate competition by rigging bids for the sale of heavy-lift derrick barge and related marine construction services in the United States and elsewhere."[6] HeereMac and Meek submitted to United States jurisdiction and pled guilty to the charges. They agreed to pay fines of $49 million and $100,000, respectively.

Following the guilty pleas, numerous companies across the globe filed suit in United States federal court seeking redress for injuries stemming from defendants' conduct. The first of these suits was filed in the Southern District of Texas in June 1998 by Phillips Petroleum Company and three of its foreign-based subsidiaries.[7]

On January 22, 1999, the court dismissed Phillips's claims for injuries sustained by its foreign subsidiaries relating to projects in foreign waters but allowed those claims asserting injury from projects in United States waters to proceed. While the court acknowledged the worldwide nature of the alleged conspiracy in its order, it nonetheless held that subject

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[5] Statoil does not allege that it owns, operates, or commissions any oil exploration platforms within United States waters, or that it conducted business with any of the defendants incorporated in the United States.

[6] The plea agreement separately addressed issues related to commerce affected by defendants' conduct in the Gulf of Mexico and commerce affected by defendants' activity in the North Sea and Far East.

[7] A group of about forty plaintiffs brought a second suit against defendants in the Northern District of Texas.

matter jurisdiction did not exist for those claims pled by foreign-based subsidiaries for injuries allegedly sustained on foreign platforms.[8] Specifically, the court determined that those claims did not fall within the ambit of the United States antitrust laws because the claims did not arise from a direct and substantial effect on United States commerce.[9]

Statoil filed this suit in the same court in December 1998. The court dismissed Statoil's complaint against the defendants on July 12, 1999.[10] In its order, the court relied heavily upon its decision in the Phillips case and found no subject matter jurisdiction over the claims because "Statoil's damages arise from its projects in the Norwegian sector of the North Sea"; thus, the FTAIA's requirement that the effect on domestic commerce "gives rise" to the antitrust claim was not satisfied. *See* 15 U.S.C. § 6a(2). The court also held that the defendants' conspiracy "did not have a direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce" under the FTAIA. *See* 15 U.S.C. § 6a(1). Finally, the court determined that "Statoil lacks standing to bring a claim under United States antitrust laws because its alleged injuries are not of the type that the antitrust statute was intended to redress."[11] Statoil timely appealed the judgment.

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[8] The court determined it did have subject matter jurisdiction over the alleged conspiracy and injury "relating to the Mahogany project in the territorial waters of the United States in the Gulf of Mexico."

[9] The court stated that "the claims of the foreign-based [subsidiaries] regarding injuries sustained in relation to the foreign platforms" were not justiciable in United States courts because "the primary injury to that party must be caused in the United States and substantially affect United States commerce."

[10] The defendants filed motions to dismiss based on lack of subject matter jurisdiction (Rule 12(b)(1)) and failure to state a claim under the Sherman Act (Rule 12(b)(6)).

[11] The court then declined to exercise supplemental jurisdiction over the remaining common law claims pursuant to 28 U.S.C. § 1367(c)(3).

IV

The issue presented to us is primarily one of statutory interpretation. Specifically, this appeal requires us to interpret the relevant provisions of the FTAIA to determine whether the defendants' conduct and Statoil's injury in the North Sea presents a justiciable claim in the federal courts of the United States.

It is not helpful that the federal courts have generally disagreed as to the extraterritorial reach of the antitrust laws and have employed assorted tests to determine the scope of the Sherman Act. The history of this body of case law is confusing and unsettled.[12] However, as far as this appeal is

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[12] The first case to consider the extraterritorial application of United States antitrust law was *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). In that case, Justice Holmes announced that the Sherman Act could have no application to conduct that occurred outside of the United States. *Id.* at 357, 29 S.Ct. 511. However, as the United States became increasingly involved in foreign commerce in the years following *American Banana*, the Supreme Court relaxed its previous stance and held that the Sherman Act authorized jurisdiction over foreign defendants so long as domestic commerce was affected and some conduct occurred within the United States *See United States v. Sisal Sales Corp.*, 274 U.S. 268, 276, 47 S.Ct. 592, 71 L.Ed. 1042 (1927). In 1945, the Second Circuit laid the groundwork for what became known as the "effects test" to determine antitrust jurisdiction over foreign conduct. In *United States v. Aluminum Company of America ("Alcoa")*, 148 F.2d 416 (2d Cir.1945), Judge Learned Hand determined that a United States court would have jurisdiction over the conduct of foreign corporations where that conduct was intended to, and actually did, affect United States commerce. *Id.* at 443-44. The *Alcoa* effects test has been gradually adopted by most federal courts, albeit in various forms. The already confused effects test was even more imprecise following the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Cir.1976). In that case, the court introduced a balancing test that considered principles of comity in addition to domestic effects when determining the scope of antitrust jurisdiction over foreign defendants. The Fifth Circuit adopted a similar comity-informed approach. *See American Rice, Inc. v. Arkansas Rice Growers Co-op. Ass'n*, 701 F.2d 408, 413 (5th Cir.1983). Most recently, in 1993, the Supreme Court confirmed that "the Sherman Act applies to foreign conduct that was

concerned, our work is simplified by Congress' passage in 1982 of the FTAIA, which specifically exempts certain foreign conduct from the antitrust laws. This circuit has never interpreted the relevant portions of the FTAIA as they apply to global conspiracies and resulting foreign injury.[13] Today, we take on this task, and make no claim that it is an easy one.

V

A

We review *de novo* a district court's ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[14] *See Hebert v. United States,* 53 F.3d 720, 722 (5th Cir.1995). In ruling on a motion to dismiss for lack of subject matter jurisdiction, a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *See Barrera-Montenegro v. United States,* 74 F.3d 657, 659 (5th Cir.1996). Nevertheless, we must accept all factual allegations in the plaintiff's complaint as true. *See Williamson v. Tucker,* 645 F.2d 404, 412 (5th Cir.1981).

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meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

[13] In fact, no circuit appears to have interpreted the critical portion of the FTAIA at issue in this case--the requirement that the domestic effect on commerce "gives rise" to the antitrust claim. 15 U.S.C. § 6a(2).

[14] It is true that the defendants filed 12(b)(6) motions along with their 12(b)(1) motions. However, the district court's order establishes that the court dismissed the claims for lack of subject matter jurisdiction rather than failure to state a claim under the antitrust laws: [T]he court orders that Defendants' motions to dismiss for lack of subject matter jurisdiction are granted and that this case is dismissed without prejudice. All remaining pending motions are moot.

We first outline Statoil's argument that United States antitrust jurisdiction encompasses the conduct and injury in its complaint.

B

Statoil argues that the FTAIA does not preclude the district court's jurisdiction over its antitrust claims. Specifically, Statoil argues that the FTAIA was enacted exclusively to ensure that the conduct providing the basis of the plaintiff's claim have the requisite domestic effects, and was not intended to preclude recovery to foreign plaintiffs based on the situs of the injury.[15] Moreover, Statoil contends that Section 2 of the FTAIA was inserted only to ensure that the effect on United States commerce that provides jurisdiction is itself a violation of the antitrust laws; that is, the statute simply requires that there be some anticompetitive, *harmful* effect in this country--not just a positive or neutral domestic effect.[16]

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[15] Statoil refers to the legislative history of the FTAIA to support its interpretation: The Committee did not believe that the bill reported by the subcommittee was intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no anticompetitive effects in the domestic marketplace. Consistent with this conclusion, the full committee added language to the Sherman and FTC Act amendments to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States. H.R.Rep. No. 97-686, at 12.

[16] Statoil cites additional legislative history in support of this interpretation of the FTAIA:... [T]he domestic "effect" that may serve as the predicate for antitrust jurisdiction under the bill must be of the type that the antitrust laws prohibit. For example, a plaintiff would not be able to establish United States antitrust jurisdiction merely by proving a beneficial effect within the United States, such as increased profitability of some other company or increased domestic employment, when the plaintiff's damage claim is based on an extraterritorial effect on him of a different kind. H.R.Rep. No. 97-686, at 12 (1982) (citation omitted).

Addressing specifically the FTAIA's requirement that the domestic effect "gives rise" to its antitrust claim, Statoil primarily argues that, because the defendants operating in the Gulf of Mexico were able to maintain their monopolistic pricing only because of their overall market allocation scheme (which included agreements regarding operations in the North Sea), Statoil's injury in the North Sea was a "necessary prerequisite to" and was "the quid pro quo for" the injury suffered in the United States domestic market. Statoil alleges that the market for heavy-lift services in the world is a single, unified, global market; therefore, because the United States is a part of this worldwide market, the effect of the conspiracy, whether in the United States or in the North Sea, "gives rise" to any claim that is based upon this conspiracy.[17]

C

We must disagree with Statoil's arguments based on our reading of the antitrust statutes. Although we are controlled by the plain language of the statutes, we also find that the legislative history of the FTAIA and applicable case law supports our determination that the district court lacked jurisdiction over Statoil's claims.

We begin with an analysis of the relevant statutes and the plain language contained therein.

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[17] In addition to its statutory interpretation arguments, Statoil cites a number of cases in an attempt to support its proposition that subject matter jurisdiction exists under the Sherman Act so long as the conspiratorial conduct had an affect on United States commerce. *See Caribbean Broad. Sys., Ltd. v. Cable and Wireless PLC*, 148 F.3d 1080 (D.C.Cir.1998); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir.1997); *Hartford Fire*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612; *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978). However, none of these cases interpret the relevant provision of the FTAIA (15 U.S.C. § 6a(2)) and, therefore, none of these cases inform our inquiry into the proper interpretation of the "gives rise to" requirement.

The Supreme Court has explained that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Escondido Mut. Water Co. v. La Jolla Indians,* 466 U.S. 765, 772, 104 S.Ct. 2105, 80 L.Ed.2d 753 (1984). We are thus bound by the plain, ordinary meaning of the language used in the antitrust statutes and, in particular, the FTAIA.

We begin by first noting that the Sherman Act itself applies only to conduct in "trade or commerce *with* foreign nations." 15 U.S.C. §§ 1,2 (emphasis added). The commerce that gives rise to the action here--the contracting for heavy lift barge services in the North Sea--was not United States commerce *with* foreign nations, but commerce *between* or *among* foreign nations--that is, between or among Statoil (a Norwegian corporation), Saipem (England), and HeereMac (The Netherlands). Therefore, we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act.[18]

As we have noted, the FTAIA states that the antitrust laws will not apply to non-import foreign conduct unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect on United States domestic commerce, and (2) such effect gives rise to the antitrust claim.[19] The conduct of these

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[18] This interpretation is further strengthened by the limits placed on Congressional power in the Constitution. Article I, § 8 of the Constitution gives Congress the authority only to regulate interstate commerce and "commerce *with* foreign nations" (emphasis added). Thus, even if Congress indeed intended to regulate purely foreign commerce in the Sherman Act, it was not empowered to do so under the Commerce Clause.

[19] The dissent, like Statoil, argues that Section 2 should be read to require only that the domestic effect give rise to *any* antitrust claim, not necessarily the plaintiff's claim. This interpretation contradicts the explicit intent of Congress to require that the effect must give rise to the particular injury claimed by the plaintiff in the suit: ... [T]he full committee added language to the Sherman and FTC Act amendments to

defendants is foreign conduct that falls within the general parameters of the FTAIA and, thus, Statoil must show that the two specific requirements of the statute are met to establish subject matter jurisdiction over its claims.[20]

We accept the contention that Statoil has sufficiently alleged that the defendants' conduct--that is, the agreement among heavy-lift service providers to divide territory, rig bids, and fix prices--had a direct, substantial, and reasonably foreseeable effect on the United States market. Statoil alleges that the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-

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require that the "effect" providing the jurisdictional nexus *must also be the basis for the injury alleged under the antitrust laws.* H.R.Rep. No. 97-686, at 12 (emphasis added). The dissent asserts that reading Section 2 as requiring that the domestic effect give rise to the plaintiff's claim renders the FTAIA's proviso redundant. Although giving the statute a clear understanding is difficult, we disagree with the dissent's reading. We read Section 1(B) to provide that the export commerce covered under the exception must be conducted by a person who is engaged in that export business in the United States. Section 2 provides that the defendant's antitrust effect on this export commerce described in Section 1(B) must give rise to the plaintiff's cause of action. The proviso, in turn, states that the recovery for injuries resulting from the conduct described in Section 1(B), which gives rise to the plaintiff's antitrust claim in Section 2, is limited to injuries occurring in the United States. Therefore, we fail to see the redundancy to which the dissent refers. *See In re Copper Antitrust Litigation v. Sumitomo Corp.*, 117 F.Supp.2d 875, 884 (W.D.Wis.2000) (holding that "[t]he logical interpretation of the language of § 6a is that Congress extends domestic jurisdiction to extraterritorial conduct only when the plaintiffs have been injured by the effects on the domestic market.").

[20] Specifically, Statoil's claim falls under Section 6(a)(1)(A) and not Section 6(a)(1)(B), because defendants' conduct had no substantial effect on export trade with foreign nations.

competitive prices for oil.[21] These allegations are sufficient to satisfy the first requirement of the FTAIA.

However, Statoil fails to show that this effect on United States commerce in any way "gives rise" to its antitrust claim.[22] Based on the language of Section 2 of the FTAIA, the effect on United States commerce--in this case, the higher prices paid by United States companies for heavy-lift services in the Gulf of Mexico--must give rise to the claim that Statoil asserts against the defendants. That is, Statoil's injury must stem from the effect of higher prices for heavy-lift services in the Gulf. We find no evidence that this requirement is met here. The higher prices American companies allegedly paid for services provided by the McDermott defendants in the Gulf of Mexico does not give rise to Statoil's claim that it paid inflated prices for HeereMac and Saipem's services in the North Sea. This is not to say that any antitrust injury suffered by customers or competitors of McDermott that arose from the anticompetitive effect in the Gulf of Mexico cannot be addressed.[23] This means only that, while we recognize that

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[21] Statoil's complaint alleges that the defendants' conspiracy adversely affected at least $165 million in United States commerce during the 1993-97 period.

[22] Statoil repeatedly frames the inquiry as whether a plaintiff can suffer injury abroad, or whether the injury itself must be suffered in the United States. This approach is an incorrect formulation of the threshold question and reflects a misreading of the FTAIA. We recognize that many federal courts, including the district court in these proceedings, might have chosen to frame the analysis in this manner. However, the proper inquiry to make here is, regardless of the situs of the plaintiff's injury, did that injury arise from the anticompetitive effects on United States commerce? *See, e.g., Caribbean*, 148 F.3d 1080 (identifying that, while the situs of the injury was overseas, the claim arose from the conspiracy's effects on the United States advertising market).

[23] The dissent notes with disapproval that our interpretation of the FTAIA means that "a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce." However, our reading produces the precise result intended by Congress--that "[f]oreign purchasers should enjoy the

there may be a connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea, the FTAIA requires more than a "close relationship" between the domestic injury and the plaintiff's claim; it demands that the domestic effect "gives rise" to the claim.[24]

Statoil asks that we interpret the requirement of Section 2 that the domestic "*effect* " give rise to a claim under the antitrust laws as merely requiring that the defendants' domestic "*conduct* " (here, for example, agreements relating to the Gulf of Mexico) give rise to a claim. This interpretation is not true to the plain language of the FTAIA. Moreover, under such an expansive interpretation, any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce could flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries

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protection of our antitrust laws *in the domestic marketplace,* just as our citizens do." H.R.Rep. No. 97-686, at 10-11.

[24] Statoil argues that, had the district court accepted its allegation of a worldwide conspiracy as true, the requirements of the FTAIA would be satisfied and subject matter jurisdiction would exist. We cannot agree. Regardless of the nature of the conspiracy, Statoil must allege an injury that falls within the scope of the antitrust statutes. The assumed existence of a single, unified, global conspiracy does not relieve Statoil of its burden of alleging that its injury arose from the conspiracy's proscribed effects on United States commerce. This principle was stressed by the Supreme Court in *Matsushita:* Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. *However one decides to describe the contours of the asserted conspiracy--whether there is one conspiracy or several--respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief.* 475 U.S. at 584 n. 7, 106 S.Ct. 1348 (emphasis added).

suffered in the United States.[25] Such an expansive reading of the extraterritorial application of the antitrust laws was never intended nor contemplated by Congress. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (noting that "[w]e assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (citation omitted).

In sum, we find that the plain language of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.[26] Although the plain language of the relevant statutes is clear and controlling, we nonetheless turn now to address briefly the legislative history of the FTAIA to illustrate how that history reinforces our interpretation of the extraterritorial reach of the antitrust laws.

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[25] The dissent repeatedly emphasizes that the antitrust laws have always contemplated foreign plaintiffs recovering for their injuries. We do not disagree. We simply read the FTAIA to provide that, if individuals conspire to restrain trade such that an American market is harmed, the United States antitrust laws can provide redress to any person injured by the domestic effects of the conspiracy, even if the injured party is located overseas. *See Sumitomo*, 117 F.Supp.2d 875, 885 ("On the other hand, the antitrust laws do not apply to an action by a person injured overseas because of price-fixing in a foreign market even if the same defendants engage in price-fixing affecting an American market.").

[26] Statoil alleges that it paid inflated prices for heavy-lift services in the North Sea. This injury, however, does not arise from the alleged effect on United States commerce--that is, the higher prices paid by United States consumers for heavy-lift services in the Gulf of Mexico. While Statoil also asserts that the conspiracy had the effect of raising crude oil prices in the United States, Statoil alleges no injuries to itself occurring in the market for crude oil or arising from this domestic effect.

Before analyzing the legislative history of the FTAIA, we reemphasize that "[l]egislative history is relegated to a secondary source behind the language of the statute in determining congressional intent; even in its secondary role legislative history must be used cautiously." *Boureslan v. Aramco,* 857 F.2d 1014, 1018 (5th Cir.1988) (citation omitted). We are thus "not free to substitute legislative history for the language of the Act." *Id.*

The FTAIA House Report states that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities" and to ascertain "the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." H.R.Rep. No. 97-686, at 5, 8.[27] Moreover, the relevant House Report shows that Congress intended to exclude purely foreign transactions, like the contract for services in the North Sea between Statoil and the foreign defendants, from the reach of United States antitrust laws:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.

Id. at 10.

Thus, the legislative history of the FTAIA, while not controlling, reinforces our conclusion that a foreign plaintiff injured in a foreign marketplace must show that a substantial

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[27] The dissent seems to imply that the sole purpose of the FTAIA is to "exempt exporting from antitrust scrutiny." Although this is clearly a primary goal of the legislation, the dissent ignores the second purpose behind the FTAIA--to resolve "possible ambiguity" in the extraterritorial reach of antitrust jurisdiction. *Id.* at 4-5.

domestic effect on United States commerce "gives rise" to its antitrust claim.[28]

We now turn to address briefly applicable case law and its effect on our interpretation of the FTAIA.

3

Because few courts have directly addressed the specific meaning of the FTAIA's Section 2 requirement that a domestic effect "gives rise" to the plaintiff's antitrust claim, very little case law exists to aid our inquiry. Our interpretation of the FTAIA's requirements, however, is entirely consistent with prior case law defining the jurisdictional reach of the antitrust laws. Furthermore, those decisions illustrate that our interpretation of Section 2 is not a novel reading of the statute.

To begin, we note that the only three federal courts that have addressed the narrow question before us interpreted Section 2 exactly as we have. *See Kruman v. Christie's Int'l PLC, et al.*, 129 F.Supp.2d 620 (S.D.N.Y.2001) (holding that the FTAIA permits jurisdiction "only where the conduct complained of had 'direct, substantial and reasonably foreseeable' effects in the United States and the effects giving

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[28] The dissent argues that our decision in this case is contrary to the statement in the legislative history that "[a] course of conduct in the United States ... would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic." Again, we do not assert that foreign purchasers of domestic products can never sue in United States federal court. We only hold that the FTAIA requires that a foreign plaintiff show that its injuries arise from a United States market. This is not a novel reading of the FTAIA: [T]he legislative history [of the FTAIA] reflects that Congress was proceeding from the premise that, wherever title is taken or economic injury is suffered, at least some aspect of the sales transaction took place in the United States. Any doubt on that score is resolved by ... the sentence which states that "foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do." *In re Microsoft Corp. Antitrust Litigation*, 2001 U.S. Dist. LEXIS 305, at *37 (M.D.Md. Jan. 12, 2001).

rise to jurisdiction are the basis for the alleged injury."); *In re Microsoft Corp.*, 2001 U.S. Dist. LEXIS 305, at *37 (holding that, under the FTAIA, "foreign consumers who have not participated in any way in the U.S. market have no right to institute a Sherman Act claim."); *Sumitomo,* 117 F.Supp.2d 875, 876 (holding that "it is plain from the language of this act and bolstered by the legislative history that a private plaintiff cannot sue under the antitrust laws of the United States for injuries incurred as a result of international transactions that have an anticompetitive effect on a United States market if the domestic anticompetitive effect is not the same one that gives rise to the plaintiff's injury.").

We further note that we have found no case in which jurisdiction was found in a case like this--where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market.[29] In those cases where the domestic effect on commerce did not give rise to the plaintiff's claim, courts have found subject matter jurisdiction lacking. *See, e.g., S. Megga Telecomm. Ltd. v. Lucent Technologies, Inc.*, 1997 WL 86413 (D.Del. Feb.14, 1997) (anticompetitive domestic effect of higher prices for United States consumers did not "give rise" to plaintiff's claim for lost sales to defendant); *The "In" Porters, S.A. v. Hanes Printables, Inc.*, 663 F.Supp. 494 (M.D.N.C.1987) (anticompetitive domestic effect (lost exports of United States exporters) did not "give rise" to plaintiff's claim for lost sales in France due to marketing sales agreement with defendant); *de Atucha v. Commodity Exch., Inc.*, 608 F.Supp. 510 (S.D.N.Y.1985) (conspiracy's effect on silver prices on United States exchange did not "give rise" to plaintiff's injury on London exchange).

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[29] *See Sumitomo,* 117 F.Supp.2d 875, 883 ("So far as can be determined, the issue [of interpreting the language of Section 2] never came up. In the reported cases, the courts had no occasion to address the same effects requirement because in each case, the plaintiffs' injuries arose out of the same effects experienced by the markets.").

On the other hand, in every case where jurisdiction has been found, the substantial effect on United States commerce has "give[n] rise" to the plaintiff's injury and claim under the antitrust laws. *See, e.g., Carpet Group Int'l v. Oriental Rug Importers Ass'n,* 227 F.3d 62 (3rd Cir.2000) (anticompetitive effect on domestic rug market "gives rise" to plaintiff's injury); *Caribbean,* 148 F.3d 1080 (monopolization of United States market for advertising in the Caribbean "gives rise" to plaintiff's claim of being blocked from that market); *Nippon Paper,* 109 F.3d 1 (collusion amongst fax paper producers resulted in higher prices for fax paper in the United States, which "gives rise" to the United States' claim); *Hartford Fire,* 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (conspiracy's effect on the United States insurance market "gives rise" to the plaintiffs' injury, the inability to obtain certain types of coverage in that market).

Finally, we note that none of the cases cited by Statoil in support of its interpretation of the FTAIA cast doubt upon our plain language interpretation of Section 2. Statoil cites *Pfizer v. India,* 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), for the proposition that antitrust jurisdiction exists over foreign conduct like the commerce between Statoil and defendants in this case. *Pfizer,* however, was decided four years before enactment of the FTAIA, and the court's holding was limited to the question of whether a foreign government qualified as a "person" under the Sherman Act. *Id.* at 320, 98 S.Ct. 584.[30] Statoil further maintains that *Caribbean Broadcasting,* 148 F.3d 1080, requires that jurisdiction be found over its claims. Initially, that case looks similar to

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[30] The dissent relies heavily upon *Pfizer* in asserting that Statoil's claim should be cognizable in United States federal court. The *Pfizer* court, however, did not analyze the requisite elements that must be present before a foreign entity can sue under the United States antitrust laws. Indeed, *Pfizer* 's narrow holding was "only that a foreign nation *otherwise entitled to sue in our courts* is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* (emphasis added).

today's case in that both the plaintiff and the defendant were foreign, and the defendant's international conspiracy had anticompetitive effects both inside and outside the United States. The critical difference, however, is that the effect on United States commerce in that case (that is, limiting to one radio station potential advertisers in the United States who wished to advertise in the Eastern Caribbean radio market) gave rise to the injury suffered by the plaintiff, a competing radio station--that is, exclusion of the plaintiff from the market for United States advertising dollars. *Id.* at 1082, 1086. As previously explained, that is simply not true with Statoil's claims.[31] Similarly, Statoil's reliance on *Nippon Paper,* 109 F.3d 1, is misplaced because the global conspiracy in that case had the domestic effect of raising fax paper prices in the United States, which gave rise to the government's claim under the antitrust laws. *Id.* at 2.

Simply put, Statoil has cited no case law to support an interpretation of Section 2 of the FTAIA different from the one we now adopt. This absence of such precedent, when considered with the plain language of the statute and evidence of congressional intent in enacting the FTAIA, reinforces our conclusion in this case.

VI

In sum, we find that the district court did not err when it dismissed Statoil's antitrust claims for lack of subject matter

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[31] The dissent asserts that we "struggle" to reconcile *Caribbean Broadcasting* with our holding in the case before us. However, the court in *Caribbean Broadcasting,* for whatever reason, completely ignored Section 2 of the FTAIA in its analysis. Given that a decision in the case before us requires an interpretation of that provision, we find *Caribbean Broadcasting* unhelpful to any resolution of Statoil's claim. Indeed, we fail to understand how *Caribbean Broadcasting* provides any meaningful support for the dissent's interpretation of Section 2, given that the plaintiff's claim in that case arose from the anticompetitive effects on the domestic market for radio advertising in the Caribbean. *See* 148 F.3d at 1086.

jurisdiction. Any reading of the FTAIA authorizing jurisdiction over Statoil's claims would open United States courts to global claims on a scale never intended by Congress. Without subject matter jurisdiction, United States federal courts are without power to entertain Statoil's claims.[32] The judgment of the district court is therefore

AFFIRMED.

PATRICK E. HIGGINBOTHAM, Circuit Judge, dissenting:

I agree that this is not an easy case, but I have no hesitation in concluding that the Foreign Trade and Antitrust Improvements Act does not here divest the federal courts of jurisdiction and that the plaintiff has standing. With deference to my colleagues, I am persuaded by the plain text of section 6a, as well as its statutory context, legislative history, and purpose.

The claim is that defendants allocated the market for hundreds of millions of dollars of commerce--an allocation that placed United States markets at the mercy of monopoly charges in an industry vital to national security. The charged conspiracy was no foreign cabal whose secondary effects only lapped at United States shores. The impact of the conspiracy was direct and substantial. Indeed, the participation of American business in the market allocation scheme was critical to its success. The plaintiff here is a foreign company, true enough, but it was injured by the same acts of defendants

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[32] As Statoil has no claim under the United States antitrust laws, we affirm the district court's finding that Statoil lacked standing to bring its claims. Based on *Associated Gen'l Contractors Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-45, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), the determination of Statoil's standing to bring its claims is dependent upon our finding of subject matter jurisdiction. Thus, in concluding that the FTAIA bars Statoil's claims against defendants under the Sherman Act, we have perforce found that Statoil's injury is not of the type that the antitrust statute was intended to forestall.

that injured American plaintiffs whose right to seek recovery of their losses the district court recognized in this litigation.

With the Foreign Trade and Antitrust Improvements Act, Congress set out to insulate United States business from its antitrust laws for certain business conducted outside the country. Its central purpose was to assist American business in competing abroad. This pass from antitrust restrictions did not extend to all conduct outside the United States. It stopped short of insulating conduct having direct and substantial effects upon American commerce and causing antitrust injury to that commerce sufficient to support a claim for treble damages.

I am not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct. That was not the law before this effort to assist American business abroad, and Congress did not intend to change it or do so unwittingly. I would reverse and remand for further proceedings.

I

A

Interpretation of a statute must begin with the text of the statute itself. Section 6a states in its entirety:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--

(1) such conduct has a direct, substantial, and reasonably foreseeable effect--

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

[Proviso:] If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States. [1]

Section 6a(1) requires an effect on (A) domestic or import commerce of the United States or (B) the export commerce of a person in the United States.[2] Section 6a(2) requires that this effect "give[ ] rise to a claim under the provisions of sections 1 to 7 of this title, the Sherman Act, other than this section." The majority reads section 6a(2) to require that the effect "give[ ] rise to" *the plaintiff's* claim. It does not say that. It does say that the effect must "give[ ] rise to *a* claim."[3] In other words, the effect on United States commerce must be sufficient to support a claim, an injury of some person in a way cognizable under the Sherman Act.[4]

The literal text of the statute supports this conclusion. It reads, "gives rise to a claim." The word "a" has a simple and universally understood meaning. It is the indefinite article. There are many terms of art about which one can debate whether Congress uses the term as courts do, but this word is not one of them. If the drafters of the FTAIA had wished to

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[1] 15 U.S.C.A. § 6a (1997).

[2] For brevity, I herein refer to the effects required by section 6a(1) as effects on "United States commerce."

[3] 15 U.S.C. § 6a(2) (emphasis added).

[4] The effect must cause "antitrust injury." The "effect" described by section 6a(1) can be beneficial, neutral, or injurious. Section 6a(2) requires that this effect be injurious and, further, that the injury be caused by reduced, not increased, competition.

say "the claim" instead of "a claim," they certainly would have.[5]

The reference to "a" claim makes clear that the "effect" described by section 6a(1) must violate the Sherman Act--that is, harm competition. Section 6a(1) requires that the conspiracy have an effect on United States commerce; section 6a(2) requires that this effect either monopolize commerce or restrain trade in the United States, thereby giving rise to a Sherman Act claim. Section 6a(2) removes jurisdiction over conspiracies whose effects on United States commerce are beneficial or benign, even if they restrain competition in other parts of the world. That an injury that "gives rise to" an antitrust claim must be an injury caused by harm to competition is no light notion. It is a well established and fundamental tenet of antitrust law.[6] Termed "antitrust injury," it is frequently encountered in enforcement action

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[5] Courts will not presume that statutory language is redundant or surplusage. The majority's interpretation, however, makes the proviso at the end of section 6a redundant. Section 6a(1)(B) states that the Sherman Act applies to conduct with effects on "export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." The proviso limits the applicability of the Sherman Act under section 6a(1)(B) "to such conduct only for injury to export business in the United States ." Thus, while (1)(B) requires only that the conduct affect a person engaged in export trade in the United States, the proviso limits recovery under the Sherman Act to such persons. The majority's reading of 6a(2) renders this proviso redundant, since it requires that the effect on the exporter in the United States "give[ ] rise to" the plaintiff's claim--in other words, that the person engaged in export trade be the plaintiff.

[6] Courts have long held that private plaintiffs "must prove the existence of 'antitrust injury' " to recover under section 4 of the Clayton Act. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Supreme Court noted that the plaintiffs "must show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Id.* at 584 n. 7, 106 S.Ct. 1348. The Court explained that a "cognizable injury" is an "antitrust injury." *Id.* at 586, 106 S.Ct. 1348.

under the Clayton Act, by which Congress enlisted private enforcement in supplementation of governmental enforcement of the Sherman Act.[7]

Thus, the literal text does not require that the effect on United States commerce give rise to the plaintiff's claim. At worst, the text is sufficiently ambiguous to allow for both the construction the majority offers and the construction I believe is correct. At the least, the majority cannot find support in a plain text argument.

Accepting that the text of the FTAIA compels neither the majority's reading or mine, we must enlist other aids in determining the meaning of the statute. In doing so, I conclude that the textual conclusion that "a" means "a" is supported by the statutory context of the FTAIA, which describes the function of the FTAIA and its animating purpose, and by the purposes of the antitrust laws in general; by the legislative history of the FTAIA; and by the sparse case law that interprets the FTAIA.

B

The FTAIA was enacted as Title IV of Public Law 97-290, entitled "Export Trading Company Act of 1982."[8] Title I contains the congressional findings. Every single

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[7] The Clayton Act requires that *the plaintiff* suffer antitrust injury. The FTAIA, by contrast, requires that the United States suffer antitrust injury. *Compare* Clayton Act, 15 U.S.C.A. § 15(a) (providing cause of action to anyone "injured in *his* business or property by reason of anything forbidden in the antitrust laws") (emphasis added), *with* FTAIA, 15 U.S.C.A. § 6a(2) ("gives rise to *a* claim under the [Sherman Act]") (emphasis added). When a private plaintiff wishes to sue under the Clayton Act, the Clayton Act and FTAIA erect complementary requirements: the plaintiff must suffer antitrust injury, and persons in United States commerce must suffer antitrust injury. The majority opinion, on the other hand, appears to conflate these two concepts.

[8] Export Trading Company Act of 1982, Pub.L. No. 97-290, 96 Stat. 1233 (codified in scattered sections of 15 U.S.C.).

congressional finding relates to the importance of export business and the need to encourage export activity by American business.[9] The statute then states: "It is the purpose of this Act to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by ... modifying the application of the antitrust laws to certain export trade."[10] It could not be clearer that the FTAIA serves to exempt exporting from antitrust scrutiny, not to limit the liability of participants in transnational conspiracies that affect United States commerce. [11]

The text of the FTAIA implements this purpose perfectly. The Sherman Act, prior to the enactment of the FTAIA, applied to conduct that affected domestic, import, and export commerce. Recall that section 6a(1) limiting the reach of the

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[9] Export Trading Company Act of 1982 § 102, 96 Stat. at 1233-34.

[10] § 102(b), 96 Stat. at 1234. The Third Circuit has recently cited this language in concluding that "Congress enacted the FTAIA for the purpose of facilitating the export of domestic goods by exempting export transactions that did not injure the United States economy from the Sherman Act and thereby relieving exporters from a competitive disadvantage in foreign trade." *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 71 (3d Cir.2000).

[11] Because the language of the statute is clear, we need not resort to its legislative history to discern its purpose. In any case, the legislative history only reiterates this single, motivating purpose. *See* H.R.Rep. No. 97-686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487 (describing the legislation as "the bill . . . to exclude from the application of [the antitrust laws] certain conduct involving exports" and "one of several bills ... that seek to promote American exports"). The excerpt of legislative history upon which the majority relies, that the purpose of the law is "to more clearly establish when antitrust liability attaches to international business activities," is certainly a true statement, but it expresses the purpose of the law at a level of generality that offers us no guidance on the narrow question we face. What the majority has overlooked is that Congress has spoken with much more particularity as to the purpose of this law: the purpose of the FTAIA is to promote exports by exempting American exporting activity from the antitrust laws.

Sherman Act applies to conduct that affects (1) domestic commerce; (2) import commerce; or (3) export commerce, but only to the extent that American exporters are affected. One class of conduct is excluded: conduct that affects only foreign purchasers of American exports. This is the function of the FTAIA: to protect American exporters who monopolize or conspire to restrain export trade that does not harm United States commerce.

The purpose of the FTAIA offers no support for the majority's reading of the statute. It is undisputed that if proved, the conspiracy in this case would have direct, substantial, and reasonably foreseeable effects upon United States commerce. No American exporters are implicated by this suit. American exporting business can only be harmed by the alleged conspiracy in this case.

Indeed, interpreting the FTAIA as the majority wishes will impair the competitiveness of American exporters. Under the majority's view, an American cartel that fixes prices worldwide will be subject to Clayton Act suits by plaintiffs from around the world,[12] but a foreign cartel that fixes prices worldwide will be subject to suit under the Clayton Act only from plaintiffs injured in American commerce. This interpretation of the FTAIA transforms a safe harbor for American exporters into a boon for foreign cartels that restrain commerce in the United States.

With respect to my colleagues, I fear that their reading of the FTAIA will hinder its purposes and reduce the effectiveness of the antitrust laws. Nothing in the text of the FTAIA, or the Export Trading Company Act of 1982 as a whole, or its legislative history, casts doubt on the importance of deterring

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[12] This cannot seriously be disputed. The FTAIA does not alter the holding of *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978), which allowed foreign governments to sue an American cartel that charged supra-competitive prices for pharmaceuticals worldwide. The legislative history approves of *Pfizer*. *See* H.R.Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495.

restraints of trade that affect United States commerce. The Supreme Court has repeatedly recognized that the accent of the Sherman and the Clayton Acts is deterrence, requiring violators to pay full, treble damages, even if some plaintiffs gain a windfall or are foreigners. For example, in *Illinois Brick Co. v. Illinois,*[13] the Supreme Court noted the importance of "vigorous private enforcement of the antitrust laws" and "deterring violators" and recognized that "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation."[14]

The Supreme Court in *Pfizer, Inc. v. Government of India*[15] addressed a situation somewhat analogous to this case. The government of India sued several American pharmaceutical manufacturers under the Clayton Act for damages caused by a price-fixing conspiracy. Like Statoil, the government of India alleged a worldwide conspiracy that raised prices in the United States and abroad. Unlike in this case, in *Pfizer* the sales were made in the United States.[16] In holding that foreign governments could recover under the Clayton Act, Justice Stewart observed: "Treble-damage suits by foreigners who

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[13] 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

[14] *Id.* at 745-46, 97 S.Ct. 2061, *quoting id.* at 760, 97 S.Ct. 2061 (Brennan, J., dissenting).

[15] 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

[16] Because of this, *Pfizer* is distinguishable from this case, since one can argue, as the majority does, that the injury to the foreign plaintiff occurred in the United States. But there is nothing in the reasoning of *Pfizer* that suggests that the facts of *Pfizer* define the outer limit of the antitrust laws. Further, even if we assume that the plaintiffs in *Pfizer* were injured in the United States, they were injured as buyers in an export transaction from the United States. Under section 6a(1)(B) and the majority's reading of the section 6a(2), injuries to buyers of American exports do not create jurisdiction under the antitrust laws. Yet the legislative history of the FTAIA cites *Pfizer* with approval. *Pfizer* maintains its force after the FTAIA because the conspiracy in *Pfizer* also affected Americans in domestic commerce. This is why section 6a(2) states "gives rise to a claim" and not "gives rise to the plaintiff's claim."

have been victimized by antitrust violations clearly may contribute to the protection of American consumers.... [A]n exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages."[17]

The logic underlying this conclusion is straightforward. Conspirators facing antitrust liability only to plaintiffs injured by their conspiracy's effects on the United States may not be deterred from restraining trade in the United States. A worldwide price-fixing scheme could sustain monopoly prices in the United States even in the face of such liability if it could cross-subsidize its American operations with profits from abroad. Unless persons injured by the conspiracy's effects on foreign commerce could also bring antitrust suits against the conspiracy, the conspiracy could remain profitable and undeterred.

It is no rejoinder that conspirators would simply choose to exclude the United States from any price-fixing conspiracy as long as American plaintiffs could sue. In at least some cases, including the United States in a price-fixing conspiracy is necessary to generate monopoly profits. Otherwise, arbitrage would rapidly equalize unequal prices around the globe as speculators resold goods purchased in the United States to buyers in high-price regions.[18] Thus, a cartel may find it impossible to fix prices anywhere without a worldwide conspiracy. The Sherman Act can only deter these violations if it protects all parties injured by such a conspiracy.

Justice Stewart succinctly made this argument in *Pfizer:*

The conspiracy . . . operated domestically as well as internationally. If foreign plaintiffs were not permitted to

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[17] *Id.* at 314-15, 98 S.Ct. 584.

[18] For a real-life example of an arbitrage attempt, see *Eurim-Pharm GmbH v. Pfizer, Inc.*, 593 F.Supp. 1102, 1104 (S.D.N.Y.1984) (describing how antitrust plaintiff attempted to arbitrage pharmaceuticals by repackaging drugs purchased in England for sale in Germany).

seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.[19]

C

The legislative history also supports this reading of the statute and undermines the majority's interpretation of section 6a(2). The Committee Report on the House bill that became the FTAIA states that the FTAIA

> does not exclude all persons injured abroad from recovering under the antitrust laws of the United States. A course of conduct in the United States--*e.g.*, price fixing not limited to the export market--would affect all purchasers of the target domestic products or services, whether the purchaser is foreign or domestic. The *conduct* has the requisite effects in the United States, even if some purchasers take title abroad or suffer economic injury abroad.[20]

This statement explicitly refers to plaintiffs who "suffer economic injury abroad." The majority's interpretation of the statute is contrary to this statement in the legislative history. The "effect" on United States commerce is the injury suffered by purchasers in the United States; this effect does not give rise to the injury suffered by the foreign plaintiffs. Yet the legislative history contemplates such plaintiffs recovering

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[19] 434 U.S. at 315, 98 S.Ct. 584 (footnote omitted).

[20] H.R.Rep. No. 97-686, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495 (emphasis in original), *citing Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978).

under the Sherman Act. The scenario described in this statement is virtually identical to the instant case: a conspiracy sells to buyers in the United States and abroad, and each of the buyers is injured. All are injured by the same conspiracy, and it is a conspiracy that has been injurious to competition in the United States.

The majority, however, chooses to rely on the following statement in the same House Report:

> A transaction between two foreign firms, even if American-owned, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws.... It is thus clear that wholly foreign transactions as well as export transactions are covered by the [FTAIA], but that import transactions are not.[21]

That American ownership alone should not create jurisdiction over a wholly foreign conspiracy is not controverted, controversial, or relevant to this case. What is relevant is that the language omitted from the quotation above states that if a conspiracy between two foreign firms, regardless of American ownership, does have an effect on domestic commerce, there is jurisdiction.[22]

D

I recognize that there is little precedent to guide our analysis of this question. Of the case law that does exist, there are no appellate court cases supporting the majority's holding. To the contrary, the majority must reconcile or distinguish the only other circuit court decisions interpreting the FTAIA, because all of them find jurisdiction present.

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[21] *Id.* at 2494-95.

[22] *Id.* ("Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions-- that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor.").

The majority opinion struggles, and I believe fails, to reconcile *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*,[23] which involved a foreign plaintiff alleging monopolization in radio advertising in the Caribbean by a competing radio station. The defendant was also a foreign entity. Consistent with the reasoning of this dissent, the D.C. Circuit held that the FTAIA did not preclude jurisdiction, because the plaintiff showed that the foreign defendants' conduct had the effect of harming United States purchasers of advertising. It stated: "the alleged injury is to advertisers in the United States."[24] Thus, based on the injury to advertisers in the United States, the court found jurisdiction over a suit by a radio broadcaster in the Caribbean. The D.C. Circuit did not require that the injury to American advertisers "give[ ] rise to" the plaintiff's cause of action; its determination that the injury gave rise to "a" claim was sufficient.

E

Finally, the majority's attempt to enlist the aid of the Commerce Clause and the canon of construction that creates a presumption against extraterritoriality is mistaken.

The majority suggests that the interpretation of the FTAIA that I espouse is beyond the power of Congress to regulate commerce.[25] The Supreme Court itself has recognized--in the context of the Sherman Act--that Congress has intended to regulate, and constitutionally has regulated, foreign conduct that affects United States commerce.[26] And it has been

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[23] 148 F.3d 1080 (D.C.Cir.1998).

[24] *Id.* at 1086.

[25] *See* Majority Op. at 426 n.18.

[26] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

decades since any court has taken so cramped a view of the Commerce Clause in any context.[27]

The majority is correct to note that the courts' historical willingness to apply the Sherman Act extraterritorially is not dispositive of this appeal, since the FTAIA, and not the courts' earlier interpretations of the Sherman Act, is controlling here.[28] But precisely because the FTAIA applies here, the majority's reliance on the canon against extraterritorial application of statutes is misplaced. This canon operates when Congress has not clearly spoken on the issue of extraterritoriality.[29] The FTAIA, however, explicitly addresses nothing other than extraterritoriality. We must be careful not to use such a canon when Congress is speaking directly to the relevant issue. Make no mistake: such canons reflect substantive presumptions about the content of laws. If courts apply substantive canons of construction against statutes that do speak to an issue, then it is the courts, not Congress, who are making the policy choices that form the content of legislation.[30]

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[27] *See, e.g., United States v. Lopez*, 514 U.S. 549, 552-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (recounting the development of Commerce Clause jurisprudence in the domestic context).

[28] *See* Majority Op. at 423-24.

[29] *See E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("This 'canon of construction ... is a valid approach whereby unexpressed congressional intent may be ascertained .' ... In applying this rule of construction, we look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage [extraterritorially].'").

[30] In any case, when Congress enacted the FTAIA, is was legislating against a backdrop of extraterritorial application of the Sherman Act; thus we cannot presume that Congress treated non-extraterritoriality as the default condition. *See Hartford Fire Ins.*, 509 U.S. at 796, 113 S.Ct. 2891 ("[I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States ."); *id.* at 814, 113 S.Ct. 2891 (Scalia, J., dissenting) ("[I]t is now well established that the Sherman Act

II

Because I disagree with the majority's interpretation of the FTAIA, I would reach the standing inquiry. It is straightforward; this court has restated the test for standing under the Clayton Act as "1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit."[31]

Statoil has standing. First, it has suffered injury-in-fact. It paid inflated prices directly to the defendants.

Second, Statoil has suffered antitrust injury. Antitrust injury requires that the injury to the plaintiff not merely show "injury causally linked to an illegal presence in the market" but injury "attributable to an anti-competitive aspect of the practice under scrutiny."[32] This element of standing excludes plaintiffs, primarily competitors, harmed by increased, rather than decreased, competition.[33] Statoil's injury was the direct

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applies extraterritorially."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n. 6, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962).

[31] *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir.1997). For further discussion, see *McCormack v. NCAA*, 845 F.2d 1338, 1341 (5th Cir.1988); *see also Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

[32] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990), *quoting Brunswick*, 429 U.S. at 489, 97 S.Ct. 690.

[33] *See Atlantic Richfield*, 495 U.S. at 334, 337-38, 110 S.Ct. 1884; *Brunswick*, 429 U.S. at 488-89, 97 S.Ct. 690.

result of the alleged price-fixing conspiracy and consequent restraint of trade.[34]

Third and finally, Statoil is a proper plaintiff. In determining whether a party is a proper plaintiff, it should examine "such factors as (1) whether the plaintiff's injuries or their causal link to the defendant are speculative, (2) whether other parties have been more directly harmed, and (3) whether allowing this plaintiff to sue would risk multiple lawsuits, duplicative recoveries, or complex damage apportionment."[35]

First, neither Statoil's injuries, nor their connection to the defendants, is speculative. The injuries arise from the defendants charging Statoil monopoly prices. Second, other parties have not been harmed more directly than Statoil. Statoil was a purchaser in the market for heavy-lift barge services, the market in which the defendants fixed prices. Third, allowing Statoil to sue would not risk duplicative recoveries or the like. There is no suggestion that any unnamed party can seek to recover for the same damages Statoil suffered.

III

The antitrust laws have always given federal courts jurisdiction over conspiracies that adversely affect competition in the United States. The FTAIA limits that jurisdiction; but it does so by exempting American export conspiracies, not foreign conspiracies that injure American competition.

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[34] Appellees rely heavily on the antitrust injury requirement in arguing that Statoil lacks standing. Their argument that Statoil's injury was not caused by high prices charged to U.S. consumers misconstrues the antitrust injury requirement. Antitrust injury does not limit standing to U.S. consumers but to anti-competitive injuries. *See Doctor's Hospital*, 123 F.3d at 305-06; *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).

[35] *McCormack*, 845 F.2d at 1341.

The majority opinion expresses concern that foreign litigants will flock to the United States for redress of their injuries in distant lands. The majority opinion, and the district court opinions it cites, seem to fear that the interpretation of the FTAIA that Statoil advocates makes the Sherman Act an antitrust regulation of foreign economies throughout the entire world, a paternalistic lawmaking enterprise that ignores the adequacy of foreign tribunals. But Congress has enacted no such thing. Congress enacted the FTAIA to serve the United States' narrow interest in vigorous domestic competition.

The text of the FTAIA may be inelegant, but it serves the selfish national interests of the United States: the FTAIA excludes from antitrust liability all conduct that has caused no antitrust injury to the United States economy;[36] but it enlists all injured parties--foreign or domestic--to assist the Department of Justice in deterring conduct that does harm the forces of competition in the United States. When a conspiracy causes a direct and substantial injury to competition in the United States, the Clayton Act recruits private parties to supplement the efforts of the Department of Justice in ending the conspiracy. The FTAIA ensures that parties injured by foreign aspects of the same conspiracy that harms American commerce are part of the phalanx of enforcers brought to bear by the Clayton Act. Thus, treble damages suits by parties who suffer antitrust injury from a conspiracy that has a direct and substantial harmful impact on United States commerce serve a single function: the protection of United States commerce. The FTAIA threatens no parade of horribles--it does nothing more than zealously protect competition in the United States while sparing from the docket of American courts suits involving conspiracies that affect only foreign economies.

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[36] Indeed, the fact that the FTAIA protects American exporters from antitrust liability for conduct that restrains export trade indicates that the FTAIA is not concerned with regulating foreign economies.

In sum, I believe the FTAIA does not divest the federal courts of jurisdiction over suits by plaintiffs who suffer antitrust injuries from a conspiracy that also harms competition in United States commerce. Whether the harm felt in the United States is the source of the injury to the plaintiff is irrelevant; it is the effects on the United States that creates jurisdiction. Under the facts of this case, I would conclude that the district court had jurisdiction over the suit and that Statoil had standing to sue the defendants under the Clayton Act. I respectfully dissent.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 6a. Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect –

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him

sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting a forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only –

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection

(a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if –

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section –

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.